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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

LARRY W. BRYANT,

Petitioner

v.

FRANK C. CARLUCCI, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the Constitution guarantees a federal employee the right to seek equitable protection from the courts against a violation of his First Amendment rights by his employing agency in a case where the civil service laws give him no remedy of right against that violation.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Larry W. Bryant petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.[1]

OPINION BELOW

The unpublished opinion of the Court of Appeals is printed at Appendix A, 1a to 6a. The district judge issued no written opinion but ruled from the bench and entered an order dismissing the portion of petitioner's complaint that is at issue here. The oral hearing transcript and order are printed at Appendix B, 7a to 17a.

[1] Mr. Bryant was appellant in the court below. Appellees below were Caspar W. Weinberger, then-Secretary of Defense; John O. Marsh, Jr., Secretary of the Army; and Edward C. Aldridge, Jr., Secretary of the Air Force. In this Court the current Secretary of Defense, Frank C. Carlucci, has been substituted for Mr. Weinberger. Respondents were sued in their official capacities.

JURISDICTION

The judgment of the court of appeals was entered January 20, 1988. Petitioner did not request rehearing. See footnote 2. On April 12, 1988 the Chief Justice extended the time for filing this petition to May 19, 1988. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

This case involves that part of the First Amendment of the Constitution of the United States which provides that "Congress shall make no law . . . abridging the freedom of speech." Certain provisions of the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111, are indirectly involved and are printed in Appendix C, 18a to 36a.

STATEMENT OF THE CASE

1. *Introduction.* Petitioner, a career federal employee, brought this suit to secure equitable relief from personnel actions by his employing agency which punished him for his off-the-job speech on a matter of public concern unrelated to his work. The CSRA gave him no remedy of right against those actions but, before filing suit, he had vainly exhausted the discretionary remedies available to him.

The district court and the court of appeals both denied relief to petitioner on the basis of the Fourth Circuit's earlier decision in *Pinar* v. *Dole*, 747 F.2d 899 (4th Cir. 1984), cert. denied, 471 U.S. 1054 (1985). See App. A, 3a, App. B, 13a.[2] Other circuits have reached

[2] Because of the anticipated effect of *Pinar* v. *Dole*, Mr. Bryant requested an initial hearing *en banc* in the court below, so that the full court could reconsider that decision. However, on April 13, 1987, the court of appeals denied his request. Presumably its conclusion that *Pinar* v. *Dole* governed explained that court's decision under its Internal Operating Procedures not to publish its opinion in this case.

the opposite result, holding that equitable relief is available to federal employees where the CSRA fails to provide a remedy comparable to those reviewed by this Court in *Bush* v. *Lucas*, 462 U.S. 367 (1983).

Unlike *Bush*, this case involves personnel actions to which the independent administrative and judicial review provisions of the CSRA do not apply.[3] The only statutory remedy available to victimized employees in cases such as this is a request that the Special Counsel of the Merit Systems Protection Board exercise his discretionary power to seek discipline for or administrative correction of "prohibited personnel practices." See 5 U.S.C. §§ 1204, 1206, 1207, 2301, and 2302, printed in App. C, 18a to 36a.

Petitioner made such a request, but the Special Counsel declined to act in his case. However, as this case comes to the Court, it is not disputed that the challenged actions of his superiors were taken in reprisal for his speech and publications as a private citizen on a matter of public concern unrelated to his job.

2. *Facts.* Larry W. Bryant had been a federal employee for more than 25 years when this case began. He was a GS-11 writer for the Army News Service (ARNEWS) in the Print Media Branch of the Command Information Division, part of the Office of the Army Chief of Public Affairs. His performance record was uniformly exemplary until he sought to pursue in public forums his personal belief that the federal government was suppressing facts related to incidents involving "unidentified flying objects" (UFOs). In doing so, Mr. Bryant acted as a private citizen and made no mention of his status as a federal employee.

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[3] In *United States* v. *Fausto*, ——— U.S. ———, 108 S.Ct. 668, 672-674 (1988), this Court reviewed the CSRA provisions governing various kinds of negative personnel actions against federal employees. *Bush* v. *Lucas* also took note of these provisions, 362 U.S. at 385-389, notes 28, 30, 32, 33, 35, 37, although that case arose under pre-CSRA laws.

In late 1984 and early 1985, Mr. Bryant began to publicize his concerns about UFOs through paid classified advertisements in 'civilian enterprise" newspapers serving various defense installations.[4] In these ads he sought evidence to support his belief that the government was suppressing information it possessed on UFO incidents. Some of the ads he submitted were rejected for publication in Army and Air Force newspapers on the recommendation of the installations' public affairs officers. See footnote 4.

These advertisements came to the attention of Mr. Bryant's supervisors in early 1985. After they learned of those activities, his work life changed quickly and drastically for the worse. Although he had earned three consecutive "exceptional" performance ratings, which was the top rating on the Army's 5-level appraisal scale for civilian employees, Mr. Bryant experienced a series of harassing supervisory actions during the next 12 months, including subjection of his work to review by a junior employee, removal of his authority and duties as a senior writer and substitute editor, and repeated criticisms of his performance. A supervisor told one of his co-workers in November 1985 that there were orders from "on high" to "get rid" of Mr. Bryant because he was "an embarrassment to the government." The co-worker initially refused to go on record about it, but she gave Mr. Bryant an affidavit in late 1986. Appendix in the court below, 23-29, 40-41.[5]

In November 1985 Mr. Bryant asked the Office of Special Counsel (OSC) of the Merit Systems Protection

[4] A "civilian enterprise" newspaper is published by a private publisher under contract with the military service in question. The service controls the news and editorial space and the publisher, with some limitations, is free to sell commercial and classified ads. Commonly the installation's public affairs officer serves as both editor and contact with the commercial publisher. See App. A, 2 a.

[5] The decision below recites few of these facts. They appear in the appendix to the briefs filed in the court below.

Board to investigate the harassment he was experiencing. However, on January 27, 1986, having looked only at the written information that Mr. Bryant was then able to submit with his request, OSC notified him that it found insufficient evidence of a prohibited personnel action to warrant an investigation, and that it was closing its file on his request. Appendix in the court below, 21-22, 35-38.

Only four days after OSC sent its letter, on January 31, 1986 Mr. Bryant's supervisors gave him a formal "unsatisfactory" performance rating for 1985. Six weeks later he was warned that if his performance did not "improve" during a 60-day period, he would be terminated or demoted. Mr. Bryant grieved this notice up the Army chain of command but it was rejected at every level without investigating Mr. Bryant's claim that the real purpose of his "unsatisfactory" rating was to punish him for exercising his First Amendment rights concerning UFO incidents. Appendix in the court below, 27-28.

In the meantime, Mr. Bryant's immediate supervisor had extended the original opportunity to improve for an additional 60 days. By that time, Mr. Bryant's superiors were aware of his intention to bring a civil suit to protect his rights under the First Amendment. On July 18, 1986, Mr. Bryant's immediate supervisor determined that his performance had come up to the level of "fully satisfactory." However, this was still two rating levels below his "exceptional" rating for the year before. Appendix in the court below, 18, 28.

3. *Proceedings below.* In November 1986, Mr. Bryant filed this suit under 28 U.S.C. § 1331 against the Secretaries of Defense, the Air Force, and the Army in their official capacities seeking declaratory and injunctive relief in two counts in aid of his First Amendment rights. In Count I of his complaint he sought to enjoin the defendants and their subordinates from interfering with his attempt to publish paid classified ads in commercial en-

terprise newspapers seeking UFO information. This Count I claim was later settled by a consent judgment in which the government agreed not to interfere further with these ads. App. A, 2a; App. B, 15a-17a.

In Count II of his complaint Mr. Bryant sought relief against on-the-job harassment by his Army supervisors. The government moved for summary judgment on this count, relying on the Fourth Circuit's prior decision in *Pinar* v. *Dole*. In doing so, the government acknowledged that, "the [District] Court has to take as a fact that there has been a First Amendment violation. And we accept that . . . . We assume, the Court assumes a First Amendment violation." App. B, 9a. The district court granted the government's motion on the authority of *Pinar* v. *Dole*, and entered an order dismissing Count II. App. B, 13a, 14a. That order became final and appealable under F.R.Civ.P. 54(b) when the consent judgment was entered as to Count I. App. B, 15a-17a.

On appeal the court below denied a request for hearing *en banc*, see footnote 2, above, and affirmed on the basis of its 1984 decision in *Pinar* v. *Dole*:

> We conclude that the district court was correct in the conclusion that it lacked jurisdiction to hear Bryant's claims arising out of his employment relation with the federal government. *Pinar* v. *Dole* controls. It holds that federal employees aggrieved by personnel actions are limited to the remedies provided by the Civil Service Reform Act (CSRA).

App. A, 3a.

In *Pinar* v. *Dole*, the court below had dismissed the complaint of a federal employee who claimed that he was reprimanded and suspended for two days and that his temporary promotion was terminated because he protested the policies of his superiors. Pinar, too, had exhausted his intra-agency remedies and had vainly appealed to the Special Counsel to intervene. Among Pinar's

claims which the court below rejected, relying on its reading of *Bush* v. *Lucas*, was his claim for equitable relief against harassment by his superiors in the exercise of his First Amendment rights. See *Pinar* v. *Dole*, 747 F.2d at 909-912.

REASONS FOR GRANTING THE PETITION

The decisions of the court below in this case and in *Pinar* v. *Dole*, are in conflict with the holdings of four other courts of appeals. Contrary to those decisions, the Fourth Circuit has withheld equitable relief from federal employees whose constitutional rights are violated by personnel actions of their employing agencies for which the CSRA provides no administrative and judicial remedies such as this Court found constitutionally adequate in *Bush* v. *Lucas*, 462 U.S. 367 (1983). The court below has not only misread *Bush* v. *Lucas*, but it has left federal employees uniquely vulnerable to abridgments of their basic rights, including the right at issue here, freedom of speech on public issues. That right "occupies 'the highest rung of the hierarchy of First Amendment values' and is entitled to special protection." *Connick* v. *Myers*, 461 U.S. 138, 145 (1983), quoting *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 913 (1983).

At the heart of the conflict between the lower courts are differing interpretations of what *Bush* v. *Lucas* means where First Amendment rights are violated by agency actions for which Congress has provided no administrative and judicial remedies such as the Court reviewed in that case. This petition has that much in common with the government's pending petition for certiorari in *Cooper* v. *Kotarski*, No. 86-1813. However, a related but different question is presented here in a more elemental constitutional setting, because the speech for which petitioner was punished by his agency concerned a public issue unrelated to his job and because he seeks only equitable protection against the government, whereas the employee in *Kotarski* asserted *Bivens* claims against

his supervisor for damages.[6] The punitive supervisory actions visited on petitioner in the form of lowered performance ratings, loss of previous job rights, and threatened removal, were calculated to chill his publication of these views or else force him out of his job. The decision below leaves him with no meaningful remedy against those actions.

1. The clearest reason for granting review in this case is that there is a conflict between the circuits on the right of a federal employee to seek equitable relief where that employee's exercise of First Amendment freedoms is threatened or punished by agency action for which the CSRA provides no remedy of right. It bears repeating that petitioner seeks equitable protection and does not assert a damage remedy.

The decisions of the Fourth Circuit denying such relief in *Pinar* v. *Dole* and in this case are contrary to the decisions of the Seventh, Eighth, Ninth, and District of Columbia Circuits. *Egger* v. *Phillips*, 710 F.2d 292, 297-299 (7th Cir. 1983), cert. denied, 464 U.S. 918 (1983); *McIntosh* v. *Weinberger*, 810 F.2nd 1411, 1434-1436 (8th Cir. 1987), petition for cert. pending, *Turner* v. *McIntosh*, No. 87-174; *Kotarski* v. *Cooper*, 799 F.2d 1342, 1348-1349 (9th Cir. 1986), petition for cert. pending, No. 86-1813; *Hubbard* v. *U.S. Environmental Protection Agency, Administrator*, 809 F.2d 1, 11 (D.C. Cir. 1986), and *Spagnola* v. *Mathis*, 809 F.2d 16, 22-24 (D.C. Cir. 1986).[7] See also *Freedman* v. *Turnage*, 646 F.Supp. 1460

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[6] See *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

[7] Partial rehearing *en banc* was granted in *Hubbard* and *Spagnola* to resolve the conflict between them on the right of federal employees and applicants for federal employment to maintain *Bivens*-type damage suits against agency officials. However, both panels upheld the plaintiffs' right to seek equitable relief. That has been the consistent view of the D.C. Circuit. See *Williams* v. *I.R.S.*, 745 F.2d 702 (D.C. Cir. 1984); *Cutts* v. *Fowler*, 692 F.2d 138 (D.C. Cir.

(W.D.N.Y. 1986). Arguably, two other circuits have sided with the court below, although their decisions can also be read as denying relief on traditional equitable grounds. *Hallock* v. *Moses*, 731 F.2d 754 (11th Cir. 1984); *Braun* v. *United States*, 707 F.2d 922 (6th Cir. 1983).[8] One other circuit has rejected such relief in a case where only Fifth Amendment claims were advanced. *Palermo* v. *Rorex*, 806 F.2d 1266 (5th Cir. 1987), rehearing *en banc* denied, 813 F.2d 407 (5th Cir. 1987).

The conflict between the Fourth and D.C. Circuits underscores the need for this Court to resolve this issue. At present the happenstance of where a federal employee works or where the employee's agency is headquartered within the Washington, D.C. metropolitan area results in very different protections for the same constitutional rights. An employee's freedom of speech may now depend on the side of a street or the bank of a river on which his office happens to be located. Of course, the question is important to all of the more than 2,000,000 federal employees, as it also is to the federal court system.

Since the focus of lower court disagreement is the decision of this Court in *Bush* v. *Lucas*, there is added reason for the Court to resolve the controversy and no likelihood that it will be resolved elsewhere. Because the conflict also centers on whether or not to exercise equitable

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1982); *Borrell* v. *U.S. International Communications Agency*, 682 F.2d 981 (D.C. Cir. 1982). The decision *en banc*, when issued, will not disturb those holdings. Only four of eight judges joined in the cited portion of the *Egger* v. *Phillips* decision; the other four found it unnecessary to decide that issue. *McIntosh* v. *Weinberger* involved Fifth Amendment constitutional claims.

[8] The plaintiff in *Braun* had left the government and thus had mooted his request for equitable relief. In *Hallock* v. *Moses*, the court seems to have denied relief partly because the officials accused of harassment were no longer her supervisors but also because she had not exhausted administrative remedies which the four circuits previously cited have held constitutionally inadequate.

power which all of the lower courts agree that they possess, see, e.g., *Pinar* v. *Dole*, 747 F.2d at 909-910, this Court must ultimately decide that question.

2. *Bush* v. *Lucas* does not require the withholding of equitable relief from a federal employee whose First Amendment rights have been violated and for whom the CSRA provides no compellable remedy to redress that wrong. *Bush* simply did not address that question. There the employee had already appealed his demotion under the civil service laws and, after an administrative adjudication, had received $30,000 in backpay by the time his case reached this Court. The question presented was whether this statutory remedy "should be augmented by the creation of a new judicial remedy," *id.*, 362 U.S. at 388, which might enable him to recover, in addition, damages from his supervisor.

Thus, the issue in *Bush* was whether the offensive remedy of a *Bivens* claim for damages against an employee's supervisor should be extended to the federal employment context, where a statutory remedy was already in place that was "clearly constitutionally adequate." *Id.* at 378 n.14. The Court surveyed the procedural and substantive protections which Congress had provided to federal employees in the competitive service, such as Bush, who were the subjects of removal or demotion actions.[9] Among these protections were the right to prior written notice and an opportunity to reply within the employing agency; the right to take an administrative appeal to an independent administrative tribunal and to have a trial-type hearing with the rights of cross-examination and

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[9] *Bush* arose before the CSRA was enacted but reached this Court after it had become law. The Court certainly wrote with the CSRA in mind when it described the "elaborate comprehensive scheme" that now protects civil servants, 462 U.S. at 386, and also when it noted that "[n]ot all personnel actions are covered by this system." *Id.* n.28. See also footnotes 30, 32, 33, 35, 37, at 462 U.S. 385-389.

compelled attendance of witnesses; and the right to judicial review of the final administrative decision:

> Federal civil servants are now protected by an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and procedures—administrative and judicial—by which improper action may be redressed. They apply to a multitude of personnel decisions that are made daily by federal agencies. Constitutional challenges to agency action, such as the First Amendment claims raised by petitioner, are fully cognizable within this system. As the record in this case demonstrates, the Government's comprehensive scheme is costly to administer, but it provides meaningful remedies for employees who may have been unfairly disciplined for making critical comments about their agencies.

462 U.S. at 385-386 (footnotes omitted). The concurring opinion in *Bush* deemed it important that these "meaningful remedies" provided by Congress were "substantially as effective as a damages action." *Id.* at 390.

It was the constitutional adequacy of the statutory remedies available to Bush which persuaded this Court to deny him an added damages remedy, and not simply the fact that Congress had enacted a comprehensive scheme for dealing with certain kinds of personnel actions. The court below misunderstood the *Bush* analysis in stressing the "carefully structured" remedial provisions of the CSRA. *Pinar* v. *Dole*, 747 F.2d at 960. It misapplied the conclusion in *Bush* to a very different legal situation. Even as it described the "meaningful remedies," 462 U.S. 386, that Congress had provided in demotion cases, this Court in *Bush* noted that "not all personnel actions are covered by this system." *Id.* at 386 n.28. It had already warned that it was not deciding whether Bush could have maintained his damage suit if the statutory remedies that it found to be constitutionally adequate had not applied to his demotion:

> We need not reach the question whether the Constitution itself requires a judicially fashioned damages remedy in the absence of any other remedy to vindicate the underlying right, unless there is an express textual command to the contrary. Cf. *Davis* v. *Passman*, 442 U.S. 228, 246, 99 S.Ct. 2264, 2277, 60 L.Ed.2d 846 (1979). The existing civil service remedies for a demotion in retaliation for protected speech are clearly constitutionally adequate. See *infra*, at 2415-2416.

Id. at 329 n.14.

The situation here is different than that presented in *Bush* where the Court was asked to add a judicial remedy to the constitutionally adequate remedy already provided by Congress. For federal civil servants, such as petitioner, who are the victims of personnel actions that are not triable or appealable under the CSRA, the question is whether a constitutionally adequate remedy will be provided by the courts where Congress has provided none. There is no adequate CSRA remedy that applies to petitioner's case. As the history of this case illustrates, the internal grievance procedures and resort to the Special Counsel which were available to Mr. Bryant are much closer in constitutional terms to the 19th century situation when all employee rights were "entirely a matter of Executive discretion." *Id.* at 381.

The grievance procedure is indisputably so, for it is a creature of regulation and occurs entirely within the employing agency that is claimed to be the sponsor of the constitutional violations. See 5 C.F.R. Part 771. Mr. Bryant exhausted that procedure without even getting consideration of his constitutional claim. He also utilized the only "remedy" which Congress has provided in cases such as this. He asked the Special Counsel of the Merit Systems Protection Board to investigate his claim that the agency was penalizing him because of his speech concerning government suppression of UFO information.

Such harassment would constitute a "prohibited personnel practice" forbidden by 5 U.S.C. § 2302(b).[10] Under 5 U.S.C. §§ 1206, 1207, printed at App. C, infra, 18a-28a, the Special Counsel has authority to investigate an employee complaint of prohibited personnel practice and to file an administrative complaint in the Merit Systems Protection Board if the agency fails to take corrective action after the Special Counsel asks it to do so.

However, the CSRA gives the Special Counsel broad discretion at all stages. The complaining employee has no say in the timing or nature of the requested investigation. As in this case, it is often confined to a desk review of the "evidence" that the employee is able to gather and submit on his own.[11] Even if the Special Counsel ultimately files an administrative complaint, the employee is not a party to the proceeding and has no control over its conduct or disposition. See, e.g., *McIntosh* v. *Weinberger*, 810 F.2d at 1435-1436; *Kotarski* v. *Cooper*, 799 F.2d at 1348-1349.

Not surprisingly, *McIntosh* and *Kotarski* joined the D.C. Circuit and the Seventh Circuit in holding that the

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[10] The 'practice' would be prohibited because it is based on "conduct which does not affect the performance of the employee," § 2302(b)(10) and because it violates a "law" implementing the merit principles contained in section 2301, namely, the First Amendment. See 5 U.S.C. § 2301(b)(2), § 2302(b)(11). See App. C, 28a-36a.

[11] In this case, 10 weeks after Mr. Bryant asked the OSC to investigate his First Amendment complaint it replied that it had "carefully reviewed the information you sent," had found "insufficient evidence" of a prohibited personnel practice, and accordingly "we are closing the file in this matter." Appendix in the court below, pp. 21-22, 35-38. If it had conducted a field investigation, OSC might have obtained the affidavit given to Mr. Bryant some 10 months later by a co-worker, in which she stated that one of her superiors had boasted that there were orders from "on high" to "get rid of Larry Bryant because he is an embarrassment to the government." Appendix in the court below, 40-41.

Special Counsel provisions of the CSRA do not provide a constitutionally adequate remedy that would justify denial of access to the courts where constitutional rights are at stake. See *Spagnola* v. *Mathis*, 809 F.2d at 22-24;[12] *Egger* v. *Phillips*, 710 F.2d 292, 298 n.5 and accompanying text. See also *Freedman* v. *Turnage*, *supra*. The court below stands alone among courts of appeals, so far as we are aware, in holding that the Special Counsel "remedy" is constitutionally adequate in such circumstances. It bases that position principally on the perceived "end run" anomaly that would result if the victims of allegedly less serious federal personnel actions were able to go directly to court, whereas those who are removed or demoted may not do so in light of *Bush* v. *Lucas*. See *Pinar* v. *Dole*, 747 F.2d at 911. However, *Bush* gives no support for such reasoning. There the court rejected an attempt to *augment* a statutory remedy with a *Bivens* claim for damages against the employee's supervisor. More importantly, it reached that conclusion after making a predicate determination that the statutory remedy available to a demoted employee was constitutionally adequate. It is emphatically for this Court to say what *Bush* v. *Lucas* means for cases in which that determination cannot be made. This is such a case.

3. The decision below also imputes to Congressional silence a conscious decision to withhold from federal employees judicial relief that would be available to any other citizen whose First Amendment rights were abridged by federal officials. The result virtually satirizes the wording of the First Amendment: Because Congress *has* made no effective remedial law respecting these abridgements, they are deemed beyond the reach of the courts.

That reasoning is hard to square with "the presumed availability of federal equitable relief against threat-

[12] The earlier D.C. Circuit decisions are cited in *Spagnola*, 809 F.2d at 22-24.

ened invasions of constitutional interests." Justice Harlan concurring in *Bivens*, 403 U.S. at 404. This Court has always been more receptive to "redress designed to halt or prevent the constitutional violations rather than the awards of money damages." *United States* v. *Stanley*, —— U.S. ——, 107 S.Ct. 3054, 3063 (1987), and cases cited. Similarly the D.C. Circuit panel which decided *Hubbard* v. *E.P.A. Adm'r*, nonetheless acknowledged the availability of injunctive relief in contrast to a damages remedy: "The courts' power to impose equitable remedies against agencies is broader than its power to impose legal remedies against individuals." *Id.*, 809 F.2d at 11 n. 15.

Insofar as the court below rested its decisions here and in *Pinar* on the scheme of the CSRA, it has permitted the purposes of that statutory scheme, which overlap but by no means coincide with constitutional requirements, to modify those requirements. The Congressional intent in enacting the CSRA was recently reviewed by the Court in *United States* v. *Fausto*, —— U.S. ——, 108 S.Ct. 668 (1988). Noting that "[a] leading purpose of the CSRA was to replace the haphazard arrangements for administrative and judicial review of personnel actions," —— U.S. ——, 108 S.Ct. at 671, the Court then reviewed those "haphazard arrangements" and said:

> Congress responded to this situation by enacting the CSRA, which replaced the patchwork system with an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration.

Id. —— U.S. ——, 108 S.Ct. at 672. In *Fausto* this scheme was held to preclude an excepted service nonveteran from suing under the Back Pay Act, 5 U.S.C. § 5596, to recover back pay for a 30-day suspension which he challenged as improper, a right which such em-

ployees formerly had. Because the CSRA provided no administrative appeal for such employees, the Court found the intent of Congress to withdraw the right of suit "fairly discernible" from the overall scheme of the CSRA. *Id.* at 675-676.

Fausto would seem to preclude any claim that federal employees can find an independent *statutory* basis for protecting their rights in the laws that antedate the CSRA. However, it did not impinge on "the courts' common-law powers to vindicate constitutional rights." Justice Blackmun, concurring in *Fausto*, —— U.S. ——, 108 S.Ct. at 668. The Fourth Circuit's reasoning is a singular response to the claim of First Amendment violation, as the District of Columbia Circuit pointed out in *Spagnola* v. *Mathis*:

> Only one circuit that, subsequent to *Bush*, has found the OSC remedy to preclude a *Bivens* action has considered the adequacy of the OSC procedures. The Fourth Circuit in *Pinar* v. *Dole*, 747 F.2d 899 (4th Cir. 1984), cert. denied, 471 U.S. 1016 (1985), addressed an employee's claim of retaliatory disciplinary action and concluded that "Pinar was afforded constitutionally adequate procedures [in the OSC] to protect his first amendment rights." *Id.* at 908. In reaching this conclusion, however, the court inappropriately applied the due process balancing test enunciated in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), see *Pinar*, 747 F.2d at 908, overlooking an important distinction between due process and First Amendment analysis. In the due process context courts look to see what kind of hearing if any is due before someone may be deprived of a liberty or property interest. They have concluded that when the threatened deprivation is relatively minor less elaborate and formal process is required. See, e.g., *Board of Regents* v. *Roth*, 408 U.S. 564, 570 n.8 (1972); *Arnett* v. *Kennedy*, 416 U.S. 134, 164 n.1 (1974). In the First Amendment context, however, there is

> no such sliding scale of protection for speech. Retaliation in response to protected speech violates an employee's First Amendment rights just as much when that retaliation is "minor" as it does when it is "major." Many courts have recognized this distinction, dismissing a due process claim because the plaintiff was given his procedural due, but simultaneously reaching the merits of a separate First Amendment claim. See *Williams* v. *IRS*, 745 F.2d 702, 704-05 (D.C. Cir. 1984); *Murray* v. *Gardner*, 741 F.2d 434, 437, 440 (D.C. Cir. 1984), cert. denied, 470 U.S. 1050 (1985); *Altman* v. *Hurst*, 734 F.2d 1240, 1242-43 (7th Cir.), cert. denied, 469 U.S. 982 (1984); *Hughes* v. *Whitmer*, 714 F.2d 1407, 1417-18 (8th Cir. 1983); see also *Brown* v. *Brienen*, 722 F.2d 360, 365 (7th Cir. 1983) (rejecting due process claim in overtime dispute but acknowledging that a "public employer who harassed an employee in order to induce him to give up a substantive constitutional right, such as freedom of speech, would be violating" the First Amendment.) The Fourth Circuit's analysis in *Pinar* therefore is significantly flawed.

809 F.2d at 26 (parallel citations omitted).

The decisions of this Court bear out that analysis. Even where it has been necessary to "arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees," *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968), that balancing process goes to the merits of the employee's claim for relief, rather than serving as a threshold reason for refusing jurisdiction. Similarly, the question "[w]hether an employee's speech addresses a matter of public concern," is one that also goes to the merits and "must be determined by the content, form, and context of a given statement, as revealed by the

whole record." *Connick* v. *Myers*, 461 U.S. 138, 147-148 (1983). The courts below, however, refused to consider the merits of petitioner's claim.

4. In contrast to *Pickering* and *Connick*, this case involves punishment for speech on a matter of undisputed and indisputable public concern which entails no balancing of employer interests. This is also in contrast to most of the other lower federal court decisions ranged on both sides of the issues discussed above, including *Pinar* v. *Dole*. In those cases the speech clearly was job-related. However, the government has never attempted to justify the punishment of petitioner for his UFO ads, which stands admitted on the present record. See *Bush* v. *Lucas*, 462 U.S. at 372.

In light of these facts the decision below makes federal employees uniquely vulnerable to abridgement of their First Amendment rights and uniquely disabled to seek judicial protection of those rights.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-3584

LARRY W. BRYANT,
Plaintiff-Appellant,

versus

CASPAR W. WEINBERGER; JOHN O. MARSH, JR.;
EDWARD C. ALDRIDGE, JR.,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria
Claude M. Hilton, District Judge—(CA-86-1323-A)

Argued: November 3, 1987 Decided: January 20, 1988

Before MURNAGHAN and ERVIN, Circuit Judges, and KAUFMAN, Senior United States District Judge for the District of Maryland, sitting by designation.

James Harold Heller (Michael J. Kator; Kator, Scott & Heller on brief) for Appellant; Steve A. Matthews, Deputy Assistant Attorney General (Richard K. Willard, Assistant Attorney General Henry E. Hudson, United States Attorney; Leonard S. Schaitman, Civil Division, Department of Justice on brief) for Appellees.

PER CURIAM:

Larry W. Bryant is a GS-11 civilian employee editor of the Army News Service. He brought a two count suit against the Secretaries of Defense, the Army and the Air Force. Count I charged that the defendants violated Bryant's first and fifth amendment rights by interfering with his attempts to place advertisements concerning unidentified flying objects (UFOs) the government coverups of UFO incidents in civilian enterprise newspapers. Civilian enterprise newspapers are commercial newspapers published under contract with armed services components to serve specific defense installations. Their operations are governed by Department of Defense instructions that forbid advertising that implies invidious discrimination or may present a danger to loyalty, discipline or morale. Defendants apparently acted pursuant to that authority and directed civilian enterprise newspapers serving various Army and Air Force components and installations not to carry Bryant's paid advertisements seeking information on UFOs.

Count I was settled by consent judgment. Under it, Bryant will resubmit his advertisements, defendants will inform the newspapers that the advertisements do not violate regulations, and defendants will reimburse Bryant for legal expenses. The consent judgment was entered without prejudice to Count II of Bryant's complaint and was not an admission of wrongdoing on the part of either party.

Count II alleged that Bryant had been harassed by his supervisors in retaliation for exercise of his first amendment rights. Bryant averred that his work performance evaluation was changed from "exceptional" to "unsatisfactory," that he was subjected to the supervision of an employee junior to him, and that his job standards were changed to deprive him of independence and responsibility that he formerly exercised to the satisfaction of his supervisors.

Defendants moved for dismissal of Count II or, in the alternative, for summary judgment under Fed. R. Civ. P. 56(c). The district judge granted the motion by Order dated March 16, 1987, without a written opinion. The Order indicated that it was entered for reasons given from the bench. The transcript of the hearing on the motion indicates that the district court granted the motion to dismiss because it was, under *Pinar v. Dole*, 747 F.2d 899 (4th Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985), without jurisdiction.

We conclude that the district court was correct in the conclusion that it lacked jurisdiction to hear Bryant's claims arising out of his employment relation with the federal government. *Pinar v. Dole* controls. It holds that federal employees aggrieved by personnel actions are limited to the remedies provided by the Civil Service Reform Act (CSRA).

The Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 (1978), provides, with exceptions not generally relevant, four tiers of punitive personnel actions and four corresponding sets of remedies for federal employees aggrieved by a personnel action. The remedies provided by statute essentially provide minimal procedural protections that an agency must employ in its internal agency grievance procedure. Agencies can, and do, provide procedural protections in excess of the statutory minima.

Following passage of the CSRA, courts confronted the question of whether the statutory remedies are adequate to challenge personnel actions undertaken in retaliation for exercise of constitutionally protected rights. The Supreme Court, in *Bush v. Lucas*, 462 U.S. 367 (1983), considered the relief available to a NASA engineer who alleged that his proposed firing was in retaliation for statements he made that were highly critical of the agency. The proposed personnel action, removal, was an "adverse action," 5 U.S.C. § 7512 (1980), so Bush was

deemed entitled to the top tier of procedures in challenging the action, including judicial review in the Federal Circuit. 5 U.S.C. §§ 7513, 7702, 7703 (1980 & Supp. 1987).

While Bush's administrative proceedings were pending, he sought alternative or additional relief by bringing suit to recover damages for defamation. He included a *Bivens*-type [1] cause of action for violation of his constitutional rights. The Court declined to create a *Bivens* action by federal employees for alleged violation of first amendment rights where CSRA applies. It noted:

> The federal courts' statutory jurisdiction to decide federal questions confers adequate power to award damages to the victim of a constitutional violation. When Congress provides an alternative remedy, it may, of course, indicate its intent, by statutory language, by clear legislative history, or perhaps even by the statutory remedy itself, that the courts' power should not be exercised. In the absence of such a congressional directive, the federal courts must make the kind of remedial determination that is appropriate for a common law tribunal, paying particular heed, however, to any special factors counseling hesitation before authorizing a new kind of federal litigation.

Bush, 462 U.S. at 378.

The Court in *Bush* reviewed factors counseling hesitation in matters of federal personnel policy and declined "'to create a new substantive legal liability without legislative aid and as at the common law,' because we are convinced that Congress is in a better position to decide whether or not the public interest would be served by creating it." *Id.* at 390 (citation omitted).

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[1] *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

The Fourth Circuit considered punitive personnel actions allegedly taken in retaliation for exercise of first amendment rights in *Pinar v. Dole*. Pinar, a Washington National Airport guard, alleged that two personnel actions—a proposed seven day suspension (reduced at agency proceedings to a letter of reprimand) for making false statements about his supervisory, and a proposed fourteen day suspension (reduced at agency proceedings to two days) for failing properly to secure a firearm, were taken in retaliation for exercise of his first amendment rights. Pinar alleged that, since neither action was an "adverse action," his statutory remedies were less than those afforded Bush. He argued in particular that, inasmuch as Pinar had no right to judicial review, *Bush* should not control. The court rejected the distinction. It concluded that the comprehensive remedies of the CSRA, as to Pinar's requests both for damages and for injunctive relief, were exclusive. *Pinar*, 747 F.2d at 909-10.

The case at bar involves federal personnel actions less serious than those involved in *Bush* and *Pinar*. Bryant alleges that a lower performance evaluation, changes in supervision over him and changes in job responsibilities were steps taken in retaliation for his exercise of first amendment rights. Bryant's remedies under the CSRA are limited to the internal agency grievance procedure and requesting the Office of Special Counsel of the Merit Systems Protection Board to investigate whether a prohibited personnel practice has occurred. 5 U.S.C. §§ 1206, 2302(a)(2)(A) (1977 & Supp. 1987).

Bryant argues that Pinar was accorded greater remedies so *Pinar* should not control. But, Pinar futilely raised precisely the same argument in an attempt to distinguish *Bush*. The argument meets the same fate here. *Pinar* held that the CSRA remedies are exclusive. The court buttressed its statutory interpretation by noting that if direct review in district court were extended to

an employee like Pinar subjected to a minor disciplinary action while one who is fired (*e.g.*, Bush) is allowed only limited appellate review in the Federal Circuit, it would fly in the face of Congress' clear intent to distinguish between disciplinary actions according to the severity of the punishment imposed and provide for varying degrees of review based on the deprivation in question. The reasoning in *Pinar* applies *a fortiori* to Bryant's case.

Pinar holds that recourse to CSRA procedures is Bryant's exclusive remedy in challenging punitive personnel actions on the basis that they were undertaken in retaliation for his exercise of his first amendment rights. Bryant is not without recourse in vindicating his first amendment rights. He can, and did, sue to enforce them. His suit was favorably resolved for him with the consent judgment rendered as to count I. But, to challenge personnel actions, Bryant's remedies are limited to those provided in the CSRA.

While the record herein may be a bit thin, we nevertheless cannot say that the Special Counsel's investigation and conclusions in this case were clearly deficient. We caution, however, that the Special Counsel's duties must be performed thoroughly and fairly. *See Spagnola v. Mathis*, 809 F.2d 16, 23 (D.C. Cir. 1986).

Affirmed.

APPENDIX B

[1]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

C.A. 86-1323-A

LARRY W. BRYANT,
Plaintiff,

—VS—

CASPAR WEINBERGER, *et al.*,
Defendants.

HEARINGS ON MOTIONS
March 13, 1987
Before: CLAUDE M. HILTON, Judge

APPEARANCES:

James H. Heller and William Aramony, Counsel for the Plaintiff Nash Schott, Counsel for the Defendants

[2] THE CLERK: Civil action 86-1323-A, Larry W. Bryant versus Caspar W. Weinberger and others.

MR ARAMONY: Your Honor, my name is Bill Aramony. I would like to move for purposes of this motion the admission of James Heller, a member of the District of Columbia Bar and federal courts therein.

THE COURT: Very well.

MR. SCHOTT: Good morning, Your Honor, for the record my name is Nash Schott appearing on behalf of the defendants.

Your Honor, this motion comes to this Court on behalf of the defendants. The defendants ask for summary judgment with respect to count two of the two count complaint in this action.

Your Honor, just briefly, the plaintiff, Mr. Bryant, is a civilian employee, a GS-11 writer with the Office of Public Affairs with the Department of the Army. He has before the Court a two count complaint. Count one alleges that because of his continuing and longstanding interest in unidentified flying objects, the Army has attempted and has violated—

THE COURT: I have read the complaint in the case, Mr. Schott.

MR. SCHOTT: Then with respect to count two the Government would ask for summary judgment stating that the law in the Fourth Circuit is clear, that when a civilian employee [3] such as Mr. Bryant has remedies under the Civil Service Reform Act for minor personnel actions, despite his allegations of First Amendment violations, with all due respect, this Court does not have subject matter jurisdiction to entertain, to entertain that action.

Now, Your Honor, I just would like to respond briefly to the memorandum which was just filed last night and point out the distinctions made by plaintiff's counsel. Plaintiff's counsel attempts to distinguish *Pinar v. Dole* on the following facts. First of all, plaintiff's counsel says *Pinar v. Dole*, which involved a case involving an officer with the Federal Aviation Administration filing, this District Court actually, contending that he was not afforded remedies sufficient to address his First Amendment violation, they are saying that case involved a *Bivens* type action. *Pinar* in that case was seeking monetary damages against superiors for his alleged First Amendment violations. But also that case clearly addressed, just as this case does, Pinar and Bryant both

seek injunctive relief. They seek this Court's relief in the form of an injunction to address First Amendment violations.

In *Pinar* at page 909 of the opinion the Fourth Circuit clearly considered that and said despite the contention that we have, we should enjoin future First Amendment violations in the work place, we are not going to do so because there are other adequate remedies provided *Pinar* under the Civil Service Reform [4] Act.

Number two, plaintiff says, well, we have come into court today, Your Honor, with an affidavit filed by Miss Lisa Fetterolf, therefore our evidence is stronger than the evidence that *Pinar* presented. For purposes of this motion, Your Honor, and the *Pinar* case clearly stands for that fact, we take, we take the, the Court has to take the fact that there has been a First Amendment violation. And we accept that. So, their affidavit making, quote, their case a little stronger, arguendo on the evidence is not the issue here. We assume, the Court assumes a First Amendment violation.

But that still does not overcome the burden they have to show, which is in this case, Your Honor, since the Civil Service Reform Act provided Mr. Bryant with relief to the Office of Special Counsel— He went to the Office of Special Counsel with his complaint in November of '85. It was denied in January of '86 by the Office of Special Counsel, they did not entertain it. He also had a grievance procedure which resulted in a USACARA investigation. Those remedies are sufficient to deal with minor personnel actions.

And the Fourth Circuit says, even if there is a First Amendment violation, because the Court considers not the First Amendment violation in isolation, but they compare it to the gravity of the personnel action, and where there are minor personnel actions involved, then due process is satisfied by [5] the Civil Service Reform Act.

THE COURT: I think I understand your argument.

MR. SCHOTT: You have heard enough, Your Honor?

THE COURT: Let me hear why this isn't correct.

MR. HELLER: Your Honor, the reason it isn't correct here is because this is that case, as we said in our papers filed last night— And I am sorry about that, that was as quickly as I could get them to the Court under the rules and under my own time pressures. What we said there, Your Honor, is the critical distinction, the most critical distinction is that what was being done here was a cloak. It was not, as was in *Pinar*, a direct issue of whether or not Pinar himself had been insubordinate, as they saw it, the supervisors, or exercising free speech as he saw it.

This is a case in which Miss Fetterolf did not even tell Mr. Bryant what Colonel Rogers had said to her, which stamped this unmistakably as reprisal for First Amendment rights exercised at a time when he could have presented that in his grievance or when he could have presented that at the time to the Office of General Counsel. That happened later on.

And Miss Fetterolf is, as I have said in our papers, a very rare kind of person. This Court can get that kind of evidence, but the grievance procedure established by the Army does not get it.

Now, Mr. Bryant is not a person who is being punished [6] for the exercise of First Amendment rights on the job. He is being punished for exercising them as a private citizen. And his job is being used as a vehicle for that, but in a manner that was cloaked, until Colonel Rogers was so imprudent as to boast to Miss Fetterolf, and Miss Fetterolf had the integrity after some long hesitation, I may say, to tell Mr. Bryant and then subsequently to say, as she was not willing to say at the outset, yes, I will put that in an affidavit in your court case.

But that was not available and would not have gone to the Office of Special Counsel.

We have, I think, Your Honor, tried to tell you that what happened in the Office of Special Counsel in this case is not atypical, and it is one of the reasons why the District of Columbia circuit and other circuits have said that is not an effective remedy. There is total discretion within that office to decide how to investigate. All *Carducci versus Regan* says they must do is literally investigate in some degree.

What happened here, and Mr. Dribinsky's letter, which is Exhibit 2, the second page of Exhibit 2 to the Government's motion, is typical. It said, we looked at your papers. Well, but Mr. Bryant's papers didn't include at that time, because he did not have evidence, the fact that he was being punished for his attempt to insert these ads in the newspaper.

Pinar versus Doel does not say, as I read it, Your Honor, and of course I understand that the Fourth Circuit is [7] not something Your Honor can lightly temperize with, but it does not say that there is no jurisdiction here. It says there will be obstention in the case of the minor discipline that was involved in that kind of case where the free speech arises directly in the chain of command and on the duty.

This is not that case. This is drastic punishment. This ruins this man's career in a way that the Supreme Court has repeatedly recognized says that after 29 years you are incompetent at your job and unsatisfactory, and then gives him 60 days. And I read that, as the facts will develop at trial, Your Honor, as beling let's take the brakes off, let's take the pressure off of him now that we have delivered the message.

But, Your Honor, it is not only that, it is not only the job, but it is a case in which we have the evidence,

which *Pinar* was simply asking first a grievance panel and then this Court to infer. And this Court was really being asked to review the grievance.

THE COURT: Well, what do you allege by way of a disciplinary nature was done to your client?

MR. HELLER: The discipline, Your Honor, has to be put in quotes. This is not a disciplinary action in the lexicon of civil service. This is a punishment administered through an adverse performance rating, which can trigger removal from your job, stops pay increases, and can in any case make it almost impossible for one to try to go elsewhere and find himself [8] another job.

And that kind of discipline— I have not meant to say to Your Honor that this is discipline with a capital D, as it is referred to in the Civil Service Reform Act, this is punishment, reprisal through the use of the performance rating of a very capable employee, but suddenly telling him, no, you are not performing well, we are going to put you under a first class sergeant as a reviewing editor after 29 years, and we are going to make your life hell.

And those are facts which I think we are entitled to bring out at trial, because, Your Honor, I do not believe *Pinar versus* Dole says anywhere in the world, courts in this circuit will never again look at an abridgement of First Amendment rights on behalf of a federal, in the case of a federal employee who is under the Civil Service Reform Act. What it says is, if the discipline is petty, if it arises directly out of the job, rather than, or for speech on the job—

THE COURT: You know, you are asking the Court though to review the discipline that was imposed here.

MR. HELLER: No, we are not, Your Honor. We are asking the Court to review the motivation. That is precisely the point I made in the papers filed last night. We

do not want you to look at the performance rating. We want you to look at the motivation for giving it. Performance ratings are largely very discretionary with supervisors. And this is a [9] case in which a perfectly abstractly proper thing was done for an improper reason, and would not have been done but for that improper reason. And those are the well pleaded facts. And that's what the Fetterolf affidavit says.

THE COURT: All right. I understand your position. I believe that the Government's position is correct under *Pinar*, and there just really isn't a claim here for the kind of action that was taken, which can completely be addressed, it is a minor disciplinary action that can be addressed within the agency. I don't believe there is any jurisdiction in this court, and the motion to dismiss count two is granted.

MR. SCHOTT: Thank you, Your Honor.

MR. HELLER: Thank you, Your Honor.

HEARING CONCLUDED

I certify that the foregoing is a true and accurate transcription of my stenographic notes.

NORMAN B. LINNELL, RPR CP CM CE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 86-1323-A

LARRY W. BRYANT,
Plaintiff,

v.

CASPAR WEINBERGER, Secretary of Defense, *et al.*,
Defendant.

ORDER

This matter came before the Court on March 13, 1987, on defendant's motion to dismiss or for summary judgment as to Count II. For reasons stated from the bench, it is hereby

ORDERED that the defendant's motion is GRANTED and Count II is DISMISSED.

/s/ Claude M. Hilton
United States District Judge

Alexandria, Virginia

Date Mar. 16, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

No. 86-1323-A

LARRY W. BRYANT,
Plaintiff,

CASPAR W. WEINBERGER, Secretary of Defense,
JOHN O. MARSH, JR., Secretary of the Army,
EDWARD C. ALDRIDGE, JR., Secretary of the Air Force,
Defendants.

[Filed April 15, 1987]

CONSENT JUDGMENT

The parties, through their respective counsel, having agreed to the entry of this consent judgment regarding Count I of the complaint, it is hereby ordered, adjudged, and decreed by the Court as follows:

1. Defendants, and those acting under their supervision, will allow plaintiff to resubmit all advertisements which have been submitted in the past and rejected for publication in Civilian Enterprise Newspapers (CENs), and which are the subject of Count I of the complaint. Copies of all of the advertisements which plaintiff may resubmit under the terms of this consent judgment are attached as Exhibit A. Defendants will, prior to plaintiff's resubmissions, dispatch letters informing the CEN publishers of papers that may receive resubmitted advertisements that said advertisements do not violate Department of Defense (DOD), Department of Army (DA), or Department of the Air Force (DAF) regula-

tions. These letters will also state that defendants are in no way interfering with the discretion of the CEN publisher and that the publisher is free to do as he/she deems appropriate. Copies of the DA and sample DAF letters are attached as Exhibit B.

2. Defendants will dispatch, not later than ten days from the date of this decree, a message. Copies of the messages from DOD, DAF, and DA will be furnished to all relevant CEN publishers and are attached to this judgment as Exhibit C.

3. Defendants will reimburse plaintiff for his legal expenses and fees incurred in connection with the claim asserted in Count I of the complaint in the amount of $2,000.

4. This consent judgment in no way indicates an admission of wrongdoing on the part of either party.

5. This consent judgment fully and completely resolves all outstanding disputes between the parties, whether known or unknown, accruing on or before the date of the judgment. However, this consent judgment is entered without prejudice to plaintiff's right to appeal the March 13, 1987 decision of this Court dismissing Court II of the Complaint.

/s/ Albert V. Bryan, Jr.
United States District Judge

Date: April 15, 1987

We ask for this and consent to it:

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/s/ James H. Heller
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Attorneys for the Defendants

APPENDIX C

PROVISIONS OF THE CIVIL SERVICE REFORM ACT

Title 5, United States Code

§ 1204. Special Counsel; appointment and removal

The Special Counsel of the Merit Systems Protection Board shall be appointed by the President from attorneys, by and with the advice and consent of the Senate, for a term of 5 years. A Special Counsel appointed to fill a vacancy occurring before the end of a term of office of his precedessor serves for the remainder of the term. The Special Counsel may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.

§ 1206. Authority and responsibilities of the Special Counsel

(a)(1) The Special Counsel shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.

(2) If the Special Counsel terminates any investigation under paragraph (1) of this subsection, the Special Counsel shall prepare and transmit to any person on whose allegation the investigation was initiated a written statement notifying the person of the termination of the investigation and the reasons therefor.

(3) In addition to authority granted under paragraph (1) of this subsection, the Special Counsel may, in the absence of an allegation, conduct an investigation for the purpose of determining whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.

(b)(1) In any case involving—

(A) any disclosure of information by an employee or applicant for employment which the employee or applicant reasonably believes evidences—

(i) a violation of any law, rule, or regulation; or

(ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

if the disclosure is not specifically prohibited by law and if the information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) a disclosure by an employee or applicant for employment to the Special Counsel of the Merit Systems Protection Board, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures of information which the employee or applicant reasonably believes evidences—

(i) a violation of any law, rule, or regulation; or

(ii) mismangement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

the identity of the employee or applicant may not be disclosed without the consent of the employee or applicant during any investigation under subsection (a) of this section or under paragraph (3) of this subsection, unless the Special Counsel determines that the disclosure of the identity of the employee or applicant is necessary in order to carry out the functions of the Special Counsel.

(2) Whenever the Special Counsel receives information of the type described in paragraph (1) of this subsection, the Special Counsel shall promptly transmit such information to the appropriate agency head.

(3)(A) In the case of information received by the Special Counsel under paragraph (1) of this section, if, after such review as the Special Counsel determines practicable (but not later than 15 days after the receipt of the information), the Special Counsel determines that there is a substantial likelihood that the information discloses a violation of any law, rule, or regulation, or mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to the public health or safety, the Special Counsel may, to the extent provided in subparagraph (B) of this paragraph, require the head of the agency to—

(i) conduct an investigation of the information and any related matters transmitted by the Special Counsel to the head of the agency; and

(ii) submit a written report setting forth the findings of the head of the agency within 60 days after the date on which the information is transmitted to the head of the agency or within any longer period of time agreed to in writing by the Special Counsel.

(B) The Special Counsel may require an agency head to conduct an investigation and submit a written report under subparagraph (A) of this paragraph only if the information was transmitted to the Special Counsel by—

(i) any employee or former employee or applicant for employment in the agency which the information concerns; or

(ii) any employee who obtained the information in connection with the performance of the employee's duties and responsibilities.

(4) Any report required under paragraph (3)(A) of this subsection shall be reviewed and signed by the head of the agency and shall include—

(A) a summary of the information with respect to which the investigation was initiated;

(B) a description of the conduct of the investigation;

(C) a summary of any evidence obtained from the investigation;

(D) a listing of any violation or apparent violation of any law, rule, or regulation; and

(E) a description of any corrective action taken or planned as a result of the investigation, such as—

(i) changes in agency rules, regulations, or practices;

(ii) the restoration of any aggrieved employee;

(iii) disciplinary action against any employee; and

(iv) referral to the Attorney General of any evidence of a criminal violation.

(5)(A) Any such report shall be submitted to the Congress, to the President, and to the Special Counsel for transmittal to the complainant. Whenever the Special Counsel does not receive the report of the agency head within the time prescribed in paragraph (3)(A)(iii) of this subsection, the Spceial Counsel may transmit a copy of the information which was transmitted to the agency head to the President and to the Congress together with a statement noting the failure of the head of the agency to file the required report.

(B) In any case in which evidence of a criminal violation obtained by an agency in an investigation under paragraph (3) of this subsection is referred to the Attorney General—

(i) the report shall not be transmitted to the complainant; and

(ii) the agency shall notify the Office of Personnel Management and the Office of Management and Budget of the referral.

(6) Upon receipt of any report of the head of any agency required under paragraph (3)(A)(ii) of this subsection, the Special Counsel shall review the report and determine whether—

(A) the findings of the head of the agency appear reasonable; and

(B) the agency's report under paragraph (3)(A)(ii) of this subsection contains the information required under paragraph (4) of this subsection.

(7) Whenever the Special Counsel transmits any information to the head of the agency under paragraph (2) of this subsection but does not require an investigation under paragraph (3) of this subsection, the head of the agency shall, within a reasonable time after the information was transmitted, inform the Special Counsel, in writing, of what action has been or is to be taken and when such action will be completed. The Special Counsel shall inform the complainant of the report of the agency head.

(8) Except as specifically authorized under this subsection, the provisions of this subsection shall not be considered to authorize disclosure of any information by any agency or any person which is—

(A) specifically prohibited from disclosure by any other provision of law; or

(B) specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.

(9) In any case under subsection (b)(1)(B) of this section involving foreign intelligence or counterintelligence information the disclosure of which is specifically

prohibited by law or by Executive order, the Special Counsel shall transmit such information to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate.

(c)(1)(A) If in connection with any investigation under this section, the Special Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken which requires corrective action, the Special Counsel shall report the determination together with any findings or recommendations to the Board, the agency involved, and to the Office, and may report the determination, findings, and recommendations to the President. The Special Counsel may include in the report recommendations as to what corrective action should be taken.

(B) If, after a reasonable period, the agency has not taken the corrective action recommended, the Special Counsel may request the Board to consider the matter. The Board may order such corrective action as the Board considers appropriate, after opportunity for comment by the agency concerned and the Office of Personnel Management.

(2)(A) If, in connection with any investigation under this section, the Special Counsel determines that there is reasonable cause to believe that a criminal violation by an employee has occurred, the Special Counsel shall report the determination to the Attorney General and to the head of the agency involved, and shall submit a copy of the report to the Director of the Office of Personnel management and the Director of the Office of Management and Budget.

(B) In any case in which the Special Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken, the Special Counsel may proceed with any

investigation or proceeding instituted under this section notwithstanding that the alleged violation has been reported to the Attorney General.

(3) If, in connection with any investigation under this section, the Special Counsel determines that there is reasonable cause to believe that any violation of any law, rule, or regulation has occurred which is not referred to in paragraph (1) or (2) of this subsection, the violation shall be reported to the head of the agency involved. The Special Counsel shall require, within 30 days of the receipt of the report by the agency, a certification by the head of the agency which states—

(A) that the head of the agency has personally reviewed the report; and

(B) what action has been, or is to be, taken and when the action will be completed.

(d) The Special Counsel shall maintain and make available to the public a list of noncriminal matters referred to heads of agencies under subsections (b)(3)(A) and (c)(3) of this section, together with—

(1) reports by the heads of agencies under subsection (b)(3)(A) of this section, in the case of matters referred under subsection (b); and

(2) certifications by heads of agencies under subsection (c)(3), in the case of matters referred under subsection (c).

The Special Counsel shall take steps to ensure that any such public list does not contain any information the disclosure of which is prohibited by law or by Executive order requiring that information be kept in the interest of national defense or the conduct of foreign affairs.

(e)(1) In addition to the authority otherwise provided in this section, the Special Counsel shall, except as provided in paragraph (2) of this subsection, conduct an investigation of any allegation concerning—

(A) political activity prohibited under subchapter III of chapter 73 of this title, relating to political activities by Federal employees;

(B) political activity prohibited under chapter 15 of this title, relating to political activities by certain State and local officers and employees;

(C) arbitrary or capricious withholding of information prohibited under section 552 of this title, except that the Special Counsel shall make no investigation under this subsection of any withholding of foreign intelligence or counterintelligence information the disclosure of which is specifically prohibited by law or by Executive order;

(D) activities prohibited by any civil service law, rule, or regulation, including any activity relating to political intrusion in personnel decisionmaking, and

(E) involvement by any employee in any prohibited discrimination found by any court or appropriate administrative authority to have occurred in the course of any personnel action.

(2) The Special Counsel shall make no investigation of any allegation of any prohibited activity referred to in paragraph (1)(D) or (1)(E) of this subsection if the Special Counsel determines that the allegation may be resolved more appropriately under an administrative appeals procedure.

(f) During any investigation initiated under this section, no disciplinary action shall be taken against any employee for any alleged prohibited activity under investigation or for any related activity without the approval of the Special Counsel.

(g)(1) Except as provided in paragraph (2) of this subsection, if the Special Counsel determines that disciplinary action should be taken against any employee—

(A) after any investigation under this section, or

(B) on the basis of any knowing and willful refusal or failure by an employee to comply with an order of the Merit Systems Protection Board,

the Special Counsel shall prepare a written complaint against the employee containing his determination, together with a statement of supporting facts, and present the complaint and statement to the employee and the Merit Systems Protection Board in accordance with section 1207 of this title.

(2) In the case of an employee in a confidential, policy-making, policy-determining, or policy-advocating position appointed by the President, by and with the advice and consent of the Senate (other than an individual in the Foreign Service of the United States), the complaint and statement referred to in paragraph (1) of this subsection, together with any response by the employee, shall be presented to the President for appropriate action in lieu of being presented under section 1207 of this title.

(h) If the Special Counsel believes there is a pattern of prohibited personnel practices and such practices involve matters which are not otherwise appealable to the Board under section 7701 of this title, the Special Counsel may seek corrective action by filing a written complaint with the Board against the agency or employee involved and the Board shall order such corrective action as the Board determines necessary.

(i) The Special Counsel may as a matter of right intervene or otherwise participate in any proceeding before the Merit Systems Protection Board, except that the Special Counsel shall comply with the rules of the Board and the Special Counsel shall not have any right of judicial review in connection with such intervention.

(j)(1) The Special Counsel may appoint the legal, administrative, and support personnel necessary to perform the functions of the Special Counsel.

(2) Any appointment made under this subsection shall comply with the provisions of this title, except that such appointment shall not be subject to the approval or supervision of the Office of Personnel Management or the Executive Office of the President (other than approval required under section 3324 or subchapter VIII of chapter 33 of this title).

(k) The Special Counsel may prescribe regulations relating to the receipt and investigation of matters under the jurisdiction of the Special Counsel. Such regulations shall be published in the Federal Register.

(l) The Special Counsel shall not issue any advisory opinion concerning any law, rule, or regulation (other than an advisory opinion concerning chapter 15 or subchapter III of chapter 73 of this title).

(m) The Special Counsel shall submit an annual report to the Congress on the activities of the Special Counsel, including the number, types, and disposition of allegations of prohibited personnel practices filed with it, investigations conducted by it, and actions initiated by it before the Board, as well as a description of the recommendations and reports made by it to other agencies pursuant to this section, and the actions taken by the agencies as a result of the reports or recommendations. The report required by this subsection shall include whatever recommendations for legislation or other action by Congress the Special Counsel may deem appropriate.

§ 1207. Hearings and decisions on complaints filed by the Special Counsel

(a) Any employee against whom a complaint has been presented to the Merit Systems Protection Board under section 1206(g) of this title is entitled to—

(1) a reasonable time to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(2) be represented by an attorney or other representative;

(3) a hearing before the Board or an administrative law judge appointed under section 3105 of this title and designated by the Board;

(4) have a transcript kept of any hearing under paragraph (3) of this subsection; and

(5) a written decision and reasons therefor at the earliest practicable date, including a copy of any final order imposing disciplinary action.

(b) A final order of the Board may impose disciplinary action consisting of removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, reprimand, or an assessment of a civil penalty not to exceed $1,000.

(c) There may be no administrative appeal from an order of the Board. An employee subject to a final order imposing disciplinary action under this section may obtain judicial review of the order in the United States court of appeals for the judicial circuit in which the employee resides or is employed at the time of the action.

(d) In the case of any State or local officer or employee under chapter 15 of this title, the Board shall consider the case in accordance with the provisions of such chapter.

§ 2301. Merit system principles

(a) This section shall apply to—

(1) an Executive agency;

(2) the Administrative Office of the United States Courts; and

(3) the Government Printing Office.

(b) Federal personnel management should be implemented consistent with the following merit system principles:

(1) Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open completion which assures that all receive equal opportunity.

(2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age or handicapping condition, and with proper regard for their privacy and constitutional rights.

(3) Equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided for excellence in performance.

(4) All employees should maintain high standards of integrity, conduct, and concern for the public interest.

(5) The Federal work force should be used efficiently and effectively.

(6) Employees should be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards.

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(4) have a transcript kept of any hearing under paragraph (3) of this subsection; and

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(5) The Federal work force should be used efficiently and effectively.

(6) Employees should be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards.

(7) Employees should be provided effective education and training in cases in which such education and training would result in better organizational and individual performance.

(8) Employees should be—

(A) protected against arbitrary action, personal favoritism, or coercion for partisan political purposes, and

(B) prohibited from using their official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for election.

(9) Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences—

(A) a violation of any law, rule, or regulation, or

(B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(c) In administering the provisions of this chapter—

(1) with respect to any agency (as defined in section 2302(a)(2)(C) of this title), the President shall, pursuant to the authority otherwise available under this title, take any action, including the issuance of rules, regulations, or directives; and

(2) with respect to any entity in the executive branch which is not such an agency or part of such an agency, the head of such entity shall, pursuant to authority otherwise available, take any action, including the issuance of rules, regulations, or directives;

which is consistent with the provisions of this title and which the President or the head, as the case may be, determines is necessary to ensure that personnel management is based on and embodies the merit system principles.

§ 2302. Prohibited personnel practice

(a)(1) For the purpose of this title, "prohibited personnel practice" means any action described in subsection (b) of this section.

(2) For the purpose of this section—

(A) "personnel" means—

(i) an appointment;

(ii) a promotion;

(iii) an action under chapter 75 of this title or other disciplinary or corrective action;

(iv) a detail, transfer, or reassignment;

(v) a reinstatement;

(vi) a restoration;

(vii) a reemployment;

(viii) a performance evaluation under chapter 43 of this title;

(ix) a decision pay, benefits, or awards, concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph; and

(x) any other significant change in duties or responsibilities which is inconsistent with the employee's salary or grade level;

with respect to an employee in, or applicant for, a covered position in an agency;

(B) "covered position" means any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service, but does not include—

(i) a position which is excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character; or

(ii) any position excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of good administration.

(C) "agency" means an Executive agency, the Administrative Office of the United States Courts, and the Government Printing Office, but does not include—

(i) a Government corporation;

(ii) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, and, as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities; or

(iii) the General Accounting Office.

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

(1) discriminate for or against any employee or applicant for employment—

(A) on the basis of race, color, religion, sex, or national origin, as prohibited under section

717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);

(B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a);

(C) on the basis of sex, as prohibited under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d));

(D) on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791); or

(E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation;

(2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of—

(A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or

(B) an evaluation of the character, loyalty, or suitability of such individual;

(3) coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity;

(4) deceive or willfully obstruct any person with respect to such person's right to compete for employment;

(5) influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment;

(6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;

(7) appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilan position any individual who is a relative (as defined in section 3110 (a) (3) of this title) of such employee if such position is in the agency in which such employee is serving as a public official (as defined in section 3110(a)(2) of this title) or over which such employee exercises jurisdiction or control as such an official;

(8) take or fail to take a personnel action with respect to any employee or applicant for employment as a reprisal for—

(A) a disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—

(i) a violation of any law, rule, or regulation, or

(ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) a disclosure to the Special Counsel of the Merit Systems Protection Board, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences—

(i) a violation of any law, rule, or regulation, or

(ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

(9) take or fail to take any personnel action against any employee or applicant for employment as a reprisal for the exercise of any appeal right granted by any law, rule, or regulation;

(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determinating suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States; or

(11) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing,

or directly concerning, the merit system principles contained in section 2301 of this title.

This subsection shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who disclose information to the Congress.

(c) The head of each agency shall be responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management. Any individual to whom the head of an agency delegates authority for personnel management, or for any aspect thereof, shall be similarly responsible within the limits of the delegation.

(d) This section shall not be construed to extinguish or lessen any effort to achieve equal employment opportunity through affirmative action or any right or remedy available to any employee or applicant for employment in the civil service under—

(1) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), prohibiting discrimination on the basis of race, color, religion, sex, or national origin;

(2) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), prohibiting discrimination on the basis of age;

(3) under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)), prohibiting discrimination on the basis of sex;

(4) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), prohibiting discrimination on the basis of handicapping condition; or

(5) the provisions of any law, rule, or regulation prohibiting discrimination on the basis of marital status or political affiliation.

(3)

Supreme Court, U.S.
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No. 87-1898

In the Supreme Court of the United States

OCTOBER TERM, 1988

LARRY W. BRYANT, PETITIONER

v.

FRANK C. CARLUCCI, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner, a federal employee who sought equitable relief against alleged retaliation by his superiors for his exercise of First Amendment rights, claims that the courts below erred in holding that he is limited to the remedies provided by the Civil Service Reform Act of 1978 (CSRA).

1. Petitioner, a GS-11 civilian employee of the Army News Service, is also the director of a group called Citizens Against UFO Secrecy, which believes that the government is suppressing information about unidentified flying objects (UFOs). In 1983, petitioner filed a "Petition for Writ of Habeas Corpus Extraterrestrial," in which, by his account, he asked a district court "to order the Air Force to produce, for the Court's disposition, the bodies of all crew members retrieved from crash-landed 'flying saucers' during the past three decades" (C.A. App. 36). After that petition was dismissed, he placed advertisements in newspapers reaching members of the armed forces, seeking information to support his contentions. For example, one

advertisement (appended to the consent judgment reprinted at Pet. App. 15a-17a) asked service members who were "stationed at Homestead AFB back in the seventies, when Richard M. Nixon allegedly allowed entertainer Jackie Gleason to view a repository of UFO artifacts (including some of their alien occupants)," to "[h]elp us find and reveal the truth" (Exh. A).

Petitioner claims that, after he publicized his concerns, his performance ratings generally declined from "exceptional" to "satisfactory" and that, in retaliation for his actions, his supervisors have given him less responsibility (Pet. 4-5). Petitioner has not, however, been demoted, suspended, or subjected to any other adverse personnel action.

Invoking his remedies under the CSRA, petitioner filed a prohibited personnel practice claim with the Office of Special Counsel of the Merit Systems Protection Board (MSPB) (see 5 U.S.C. 1206). The Special Counsel found no basis for concluding that a prohibited personnel practice (see 5 U.S.C. 2302) had occurred (Pet. App. 6a, 9a; Pet. 13 n.11). Petitioner subsequently filed a grievance, focusing on an "unsatisfactory" performance rating he received in early 1986.[1] A representative of the United States Army Civilian Appellate Review Agency, an independent organization that investigates grievances, held a meeting at which petitioner (who chose not to be represented by counsel) presented evidence and questioned witnesses (C.A. App. 17-18). The investigator concluded that the

[1] Under authority granted to it in the CSRA (5 U.S.C. 1302), the Office of Personnel Management (OPM) requires federal agencies, including the military, to establish grievance systems in which employees may raise "any matter of concern or dissatisfaction relating to the employment of an employee which is subject to the control of agency management" (5 C.F.R. 771.205).

"unsatisfactory" performance rating was accurate and was not given in reprisal for petitioner's UFO activities (*id.* at 19).

Petitioner thereupon sued the Secretaries of Defense, the Army, and the Air Force in the United States District Court for the Eastern District of Virginia, invoking jurisdiction under 28 U.S.C. 1331. Alleging that his First Amendment rights had been violated, petitioner sought equitable relief, but did not seek damages under *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The district court granted the defendants' motion to dismiss on the authority of *Pinar* v. *Dole*, 747 F.2d 899 (4th Cir. 1984), cert. denied, 471 U.S. 1016 (1985). In that case the Fourth Circuit held that a federal employee alleging a violation of his constitutional rights, who had no right to judicial review under the CSRA because he had suffered only minor adverse actions (a reprimand, a two-day suspension, and termination of a temporary promotion), could not otherwise invoke a court's jurisdiction (Pet. App. 13a). The district court concluded that, under *Pinar*, it likewise had no jurisdiction over petitioner's claim.

The Fourth Circuit affirmed in an unpublished opinion (Pet. App. 1a-6a). Noting that it had concluded in *Pinar* "that judicial review of minor personnel actions 'would fly in the face of Congress' clear intent to distinguish between disciplinary actions according to the severity of the punishment imposed and provide for varying degrees of review based on the deprivation in question,'" the court stated that "to challenge personnel actions, [petitioner's] remedies are limited to those provided in the CSRA" (*id.* at 6a).

2. The courts below correctly dismissed petitioner's suit. Although there is presently a conflict between the Fourth Circuit and the District of Columbia Circuit on the

question whether federal employees may bring suit in federal district court challenging personnel decisions on constitutional grounds other than through the procedures set forth in the CSRA, review of that question is not warranted at this time. The Court has recently decided a number of cases bearing on the rights of federal employees suffering adverse personnel actions—*United States* v. *Fausto,* No. 86-595 (Jan. 25, 1988), *Schweiker* v. *Chilicky,* No. 86-1781 (June 24, 1988), and *Webster* v. *Doe,* No. 86-1294 (June 15, 1988)—and the courts of appeals should reconsider what sorts of claims federal employees may bring in light of those cases before this Court considers the matter.

a. The Court held in *Fausto* that "the comprehensive nature of the CSRA" (slip op. 8) compelled the conclusion that a federal employee, who did not allege a constitutional violation, could not challenge a 30-day suspension by bringing suit under the Tucker Act in the Claims Court. The Court reached that conclusion even though the employee, a member of the "excepted service" (see 5 U.S.C. 2103(a) and 5 C.F.R. 213.3201), had no right to judicial review of the suspension under the CSRA, unlike non-probationary employees in the competitive service (see 5 U.S.C. 7511-7513, 7703).[2] Applying the test of *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 140 (1967), the Court found that " 'the presumption favoring judicial review . . . [has been] overcome by inferences of intent drawn from the statutory scheme as a whole.' " *Fausto,* slip op. 13 (quoting *Block* v. *Community Nutrition Inst.,* 467 U.S. 340, 349 (1984)). In reaching that conclusion, the Court noted that Congress intended the CSRA to replace

[2] Moreover, the employee would have had a right to review under the Tucker Act prior to the enactment of the CSRA and the CSRA did not expressly repeal that cause of action (*Fausto,* slip op. 12-15).

the " 'outdated patchwork of statutes and rules built up over almost a century' " (*id.* at 4, quoting S. Rep. 95-969, 95th Cong., 2d Sess. 3 (1978)). The Court particularly relied on the fact that it would turn the scheme of the CSRA "upside down" to allow excepted service employees to challenge suspensions directly in the Claims Court, while competitive service employees, who are generally given greater rights under the CSRA, would have to go to the MSPB before obtaining limited judicial review in the Federal Circuit (slip op. 10).

Fausto lends support to the Fourth Circuit's position that employees challenging personnel actions on constitutional grounds must proceed under the CSRA or not at all. The test applied in *Fausto* in concluding that " 'congressional intent to preclude review is "fairly discernible in the statutory scheme" ' " (slip op. 12-13, quoting *Block* v. *Community Nutrition Inst.*, 467 U.S. at 351, quoting *Data Processing Serv.* v. *Camp*, 397 U.S. 150, 157 (1970)), derived from *Abbott Laboratories*, and is the same test that this Court has applied in analyzing whether review of constitutional claims has been precluded. See *Johnson* v. *Robison*, 415 U.S. 361, 373-374 (1974).

To be sure, in *Webster* v. *Doe* the Court concluded that a constitutional claim based on the discharge of an employee of the Central Intelligence Agency (CIA) was subject to review by a district court (slip op. 10), even though Congress had plainly indicated in Section 102(c) of the National Security Act of 1947, 50 U.S.C. 403(c), that it did not intend to allow review of discharges. For two reasons, however, this Court's decision in *Webster* v. *Doe* does not mean that the district court must hold a trial to consider whether petitioner's performance ratings were lowered in retaliation for his publication of his belief that the government is suppressing information about UFOs. First, unlike the CIA employee in *Webster* v. *Doe*, petitioner has specific remedies available to him under the CSRA, which

he in fact invoked. Indeed, the prohibited personnel practice provisions were established in part so that the Special Counsel could protect whistleblowers, which is what petitioner supposes he is, from retaliation (see 5 U.S.C. 2302(b)(8)). CIA employees, in contrast, may not complain to the Special Counsel, because the CIA is specifically exempted from the prohibited personnel practice provisions by 5 U.S.C. 2302(a)(2)(C). Nor can such employees file grievances under the procedures established by OPM (see note 1, *supra*), since the CIA is specifically exempted from OPM's grievance regulations by 5 C.F.R. 771.206(a).[3] The fact that Congress provided appropriate remedies for petitioner under the CSRA supports the conclusion that it intended that he not be allowed to pursue others. Cf. *Bush* v. *Lucas*, 462 U.S. 367 (1983); *Brown* v. *GSA*, 425 U.S. 820, 834-835 (1976).

Second, the employee in *Webster* v. *Doe* was discharged, whereas petitioner primarily complains that his performance ratings have declined. The scheme of the CSRA shows that Congress did not intend to authorize judicial review of such minor matters. Under the performance appraisal system set forth in Chapter 43 of Title 5, 5 U.S.C. 4301 *et seq.*, which was established by the CSRA, employees who are proposed to be demoted or removed on account of unacceptable performance ratings have certain procedural rights (5 U.S.C. 4303(b)), and competitive service employees who are demoted or removed may challenge the adverse action in the MSPB (5

[3] We argued in passing in *Webster* v. *Doe* (see Pet. Br. at 12-13 n.9) that CIA employees were limited to their remedies under the CSRA. The Court did not address that argument.

U.S.C. 4303(e)), with review in the Federal Circuit (5 U.S.C. 7703). Employees like petitioner, however, who have not been either demoted or removed, are entitled only to file a grievance and complain to the MSPB's Office of Special Counsel about a prohibited personnel practice, as the court below recognized (Pet. App. 5a).[4] Thus, the scheme of the CSRA, under which the procedures available to an employee depend on the severity of the action taken against him, makes clear that Congress did not intend to authorize review of minor complaints such as a decline in performance ratings. Indeed, it would turn the CSRA "upside down" (*Fausto*, slip op. 10) to allow petitioner to go directly to court to challenge his performance ratings, while employees who have been demoted or removed on account of unacceptable performance ratings must complain to the MSPB, with limited review in the Federal Circuit.

Moreover, the scheme of the CSRA, under which judicial review is available only in cases involving serious adverse actions, is plainly sensible. The approach petitioner advocates, in contrast, would require judicial review of any personnel matter where an employee can frame his complaint in constitutional terms. As this case illustrates, "even the most minor of disciplinary actions can be alleged to have been taken in retaliation for something an employee once said" (*Pinar*, 747 F.2d at 911). But there is no good reason why courts should "become involved in the most rudimentary of personnel matters"; to the con-

[4] The provisions governing adverse actions not based on unacceptable performance ratings, which are in Chapter 75 of Title 5, 5 U.S.C. 7501 *et seq.*, like the provisions of Chapter 43, distinguish between the remedies available in adverse action cases based on the severity of the action. Judicial review is available only in cases of "major" adverse actions, which are defined as removals, suspensions for more than 14 days, reductions in grade or pay, and furloughs (5 U.S.C. 7512).

trary, permitting judicial review whenever an employee alleges a constitutional deprivation would "inhibit supervisors from taking even the most minor disciplinary actions for fear of having to justify their actions in federal court" (*ibid.*).

b. As petitioner states (Pet. 8-9), there is a conflict in the circuits on the question presented. The conflict, however, is much more limited than petitioner suggests. Two of the decisions petitioner cites as conflicting with the decision below—*McIntosh* v. *Weinberger*, 810 F.2d 1411 (8th Cir. 1987), vacated, No. 87-174 (June 27, 1988), and *Kotarski* v. *Cooper*, 799 F.2d 1342 (9th Cir. 1986), vacated, No. 86-1813 (June 27, 1988)—are not squarely on point because they are *Bivens* cases.[5] As petitioner recognizes (see Pet. 8-9 n.7), the question whether equitable relief is available to remedy an alleged constitutional violation is not the same as the question whether a damage remedy against individual government employees should be created under *Bivens*. Moreover, this Court recently vacated *McIntosh* and *Kotarski* and remanded for reconsideration in light of *Schweiker* v. *Chilicky*.[6] The only

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[5] Although this Court declined to recognize a *Bivens* remedy for federal employees in *Bush* v. *Lucas*, 462 U.S. at 388, citing the "elaborate remedial scheme" constructed by Congress to consider employees' claims, the courts in *Kotarski* and *McIntosh* distinguished *Bush* v. *Lucas* because the plaintiffs in those cases had more limited rights under the CSRA. *McIntosh*, 810 F.2d at 1435; *Kotarski*, 799 F.2d at 1346.

[6] The Court in *Schweiker* v. *Chilicky* declined to create a *Bivens* remedy for allegedly unconstitutional deprivations of disability benefits. Reading the decision in *Fausto*, where the Court stressed the comprehensive nature of the CSRA, together with the decision in *Schweiker* v. *Chilicky*, where the Court held that a *Bivens* remedy is not appropriate "[w]hen the design of a government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violation that may occur in the course of its

other case petitioner cites from outside the District of Columbia Circuit, *Egger* v. *Phillips*, 710 F.2d 292 (7th Cir.), cert. denied, 464 U.S. 918 (1983), is also a *Bivens* case.[7]

The decisions of the Fourth Circuit and the District of Columbia Circuit do conflict, however. The Fourth Circuit has concluded that personnel decisions, including those allegedly made in violation of the Constitution, may be challenged only as provided in the CSRA, while the District of Columbia Circuit has held that an employee without a judicial remedy under the CSRA may obtain review of a constitutional claim under other statutes.[8]

In light of the decision to remand *McIntosh* and *Kotarski* for further proceedings, it seems clear that the Court has decided that the *Bivens* issue does not warrant review at this time. The question presented here is somewhat

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administration" (slip op. 10), we would submit that no *Bivens* remedy should be created authorizing damages for unconstitutional federal personnel actions.

[7] The District of Columbia Circuit is presently considering en banc whether federal employees with limited rights under the CSRA may bring *Bivens* actions, in order to resolve its conflicting decisions on that question in *Hubbard* v. *Environmental Protections Agency*, 809 F.2d 1 (1986), and *Spagnola* v. *Mathis*, 809 F.2d 16 (1986). See 809 F.2d at 40-41.

[8] The decisions of the Fourth Circuit and the District of Columbia Circuit differ somewhat in that petitioner and the employee in *Pinar* alleged minor injuries, and the court here (Pet. App. 6a) and the court in *Pinar* relied on that fact (747 F.2d at 911). Most of the employees in the cases in the District of Columbia Circuit, in contrast, suffered more severe injuries. The employee in *Hubbard* was denied employment; the employee in *Spagnola* was denied a promotion; the employee in *Williams* v. *IRS*, 745 F.2d 702 (D.C. Cir. 1984), was suspended for five days; the employee in *Cutts* v. *Fowler*, 692 F.2d 138 (D.C. Cir. 1982), was transferred; and the employee in *Borrell* v. *United States Int'l Communications Agency*, 682 F.2d 981 (D.C. Cir. 1982), was discharged.

different in that petitioner alleges a constitutional violation but does not seek a *Bivens* remedy. Nevertheless, we think that review of the question presented here is not warranted at this time either. Although it remains our position that the Fourth Circuit has correctly concluded that Congress can preclude review of personnel decisions and has done so with respect to cases like this one, the courts of appeals should be allowed to analyze these cases under the standards of *Fausto, Schweiker* v. *Chilicky,* and *Webster* v. *Doe* before this Court again addresses the rights of federal employees challenging personnel decisions.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LARRY W. BRYANT,

Petitioner

v.

FRANK C. CARLUCCI, SECRETARY OF DEFENSE, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONER'S REPLY BRIEF

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Because his views displeased them, petitioner's federal superiors used their supervisory powers to punish him on the job for his speech off the job on a matter of public interest unrelated to his work. The Government characterizes his complaint as "minor" because the punishment did not involve his demotion or removal from his civil service job (Opp. Mem. 6-7). However, that description ignores the point that petitioner's writings which offended his superiors were "pure speech," which the Court has "repeatedly held is entitled to comprehensive protection under the First Amendment." *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 505-506 (1969).

After he had vainly sought protection from this invasion of his liberties through the non-adjudicative administrative procedures that were available to him under the Civil Service Reform Act of 1978 (CSRA), petitioner turned to the federal courts for equitable relief. The Government now urges the Court not to review the denial of that relief by the courts below.

The Government does not claim that the issue presented is unimportant. Its principal suggestion is that the Court should deny review in this case because it should "take a break" from deciding federal employment cases until it sees how the lower federal courts react to its decisions last term in *United States* v. *Fausto*, —— U.S. ——, 108 S.Ct. 668 (1988), *Webster* v. *Doe*, —— U.S. ——, 108 S.Ct. 2047 (1988), and *Schweiker* v. *Chilicky*, —— U.S. ——, 108 S.Ct. 2460 (1988) (see Opp. Mem. 4). However, none of those decisions addresses the issue presented here, *i.e.*, access to the federal courts to seek equitable protection for a federal employee's exercise of First Amendment rights where Congress has enacted no such protection.

Of those three 1987 term cases, *Webster* v. *Doe* seems to bear most closely on the issue here; yet it certainly looks in the opposite direction from the decision of the court below. There, in a case arising outside of the CSRA, the Court reaffirmed the requirement that the Congressional intent to deny judicial review must be clear. "We require this heightened showing in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Id.*, 108 S.Ct. at 2053. However, that is exactly the construction which the Fourth Circuit gave to the CSRA in this case and in *Pinar* v. *Dole*, 747 F.2d 899 (4th Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985).

As the government recognizes (Opp. Mem. 4-5) and as Justice Blackmun noted in his concurrence in *Fausto*,

108 S.Ct. at 677, that case did not involve this "serious constitutional question." Therefore, it will provide no new guidance on the question for the lower courts. *Fausto* decided only that, in enacting the CSRA, Congress intended to supersede another older statutory remedy which had previously been available to a federal employee who lost pay because of an adverse personnel action.

In *Schweiker* v. *Chilicky* the Court refused to allow a *Bivens*[1] claim for consequential damages suffered by persons who had been wrongly deprived of Social Security Act disability benefits and had succeeded in getting those benefits restored only after lengthy and costly litigation within the administrative remedy scheme established by Congress. The Court also vacated and remanded for reconsideration in light of that decision two other pending cases in which courts of appeals had upheld *Bivens*-type damage claims asserted by federal employees: *McIntosh* v. *Weinberger*, 810 F.2d 1411 (8th Cir. 1987), *vacated*, —— U.S. ——, 108 S.Ct. 2861 (1988); *Kotarski* v. *Cooper*, 799 F.2d 1342 (9th Cir. 1986), *vacated*, —— U.S. ——, 108 S.Ct. 2861 (1988). However, the remands will not disturb the lower court decisions in those cases insofar as they also approved equitable protection for federal employees against violations of their constitutional liberties.

To the extent that it bears on that issue—the one also presented here—*Schweiker* v. *Chilicky* casts added doubt on the reasoning of the court below, which relied heavily on *Bush* v. *Lucas*, 462 U.S. 367 (1983). *Schweiker* v. *Chilicky* makes it clear that *Bush* v. *Lucas* dealt only with the narrow question of an attempt to supplement the CSRA's statutory remedies with a *Bivens* damage remedy. In both cases the claimants sought damages even though the statutory schemes had provided them basic

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[1] See *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

equitable relief through quasi-adjudicative administrative procedures that were available as a matter of right and were subject to judicial review. The employee in *Bush* v. *Lucas* had already been restored to his old position with back pay. The claimants in *Schweiker* v. *Chilicky* had won restoration and payment of all their disability benefits. Thus, neither case presented the "serious constitutional question" of a statute which fails to provide *any* judicial or quasi-judicial forum for equitable relief from violations of constitutional liberties. This case does.

In deciding that question, the court below reached a conclusion that is now in conflict with the positions of at least five other circuits. The *per curiam* decision of the Eleventh Circuit in *Perry* v. *Thomas*, 849 F.2d 484 (11th Cir. 1988), indicates that it has now joined the Seventh, Eighth, Ninth and D.C. Circuits in upholding the type of constitutional claim petitioner asserts.[2] It was pointed out above that the remands of *McIntosh* and *Kotarski* will not narrow this conflict, as the Government suggests (Opp. Mem. 8); for the remands concern only the *Bivens* claims in those cases.

The Government's suggestion that the Court should simply let this unresolved constitutional issue fester for an undefined period of time is difficult to understand. Indeed, it does not seem to be advanced with much conviction. There is nothing in the decisions issued last term that will settle the issue or even persuade the Fourth Circuit to reexamine it. The outcome in future cases would continue to be an accident of geography.

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[2] *Perry* v. *Thomas* also shows that not all federal agencies agree with the Solicitor General that the federal courts are not open to grant federal employees injunctive relief against invasion of their First Amendment rights. In *Perry* the Equal Employment Opportunity Commission conceded that such relief is available in appropriate cases.

Petitioner would remain at risk of further violations of his First Amendment rights by his superiors.

Yet his case presents the strongest possible constitutional claim for relief. There is no contention by respondents that Mr. Bryant's speech was in conflict with his employment. To the contrary, it was the adventitious fact of his federal employment that gave his superiors a leverage they would not otherwise have had to punish and inhibit his speech because it offended their own views. No other case has so clearly presented the question whether the CSRA can constitutionally be construed in such a manner that it *penalizes* the liberties of citizens who happen to work for the United States by denying them relief which the federal courts would otherwise surely afford.

CONCLUSION

The petition for writ of certiorari should be granted.

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